

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97663; File No. SR-CBOE-2023-030)

June 7, 2023

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 1, 2023, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule, effective June 1, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 15% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response

³ See Cboe Global Markets U.S. Options Monthly Market Volume Summary (May 26, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

Also, in response to the competitive environment, the Exchange offers various tiered incentive programs which provide Trading Permit Holders (“TPHs”) opportunities to qualify for higher rebates or reduced rates where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for TPHs to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria. For example, the Exchange currently offers, among other tiered volume programs, a Floor Broker Sliding Scale Rebate Program, which offers four tiers that provide rebates on a sliding scale⁴ for qualifying orders where a TPH meets certain liquidity thresholds. The Program applies to all products except for Underlying Symbol List A,⁵ Sector Indexes,⁶ DJX, MRUT, MXEA, MXEF, NANOS, XSP, and FLEX Micros (“multiply-listed options”). The Program offers two categories of

⁴ The rebate offered under each tier is only applied to the qualifying volume within that tier. In addition, the Exchange calculates the average rebate for each type of rebate (Firm Facilitated and Non-Firm Facilitated) based on the TPH’s total qualifying volume across all four tiers plus its qualifying baseline volume (which corresponds to a rebate of \$0.00). Each respective average rebate is applied to the percentage of qualifying volume that corresponds specifically to the type of order (Firm Facilitated or Non-Firm Facilitated) volume and added together, which results in a final average rebate. The final average rebate is then applied to the TPH’s total qualifying executions. This is consistent with the manner in which the Exchange calculates rebates for other sliding scale programs offered under the Fees Schedule.

⁵ See Cboe Options Fees Schedule, Footnote 34, which provides that Underlying Symbol List A includes OEX, XEO, RUT, RLG, RLV, RUI, UKXM, SPX (includes SPXW), SPESG and VIX.

⁶ See Cboe Options Fees Schedule, Footnote 47, which provides that Sector Index underlying symbols include IXB, SIXC, IXE, IXI, IXM, IXR, IXRE, IXT, IXU, IXV AND IXY, and corresponding option symbols include SIXB, SIXC, SIXE, SIXI, SIXM, SIXR, SIXRE, SIXT, SIXU, SIXV AND SIXY.

rebates that correspond to each of the proposed tiers; one that applies to Firm Facilitated orders (i.e., orders that yield fee code FF)⁷ and another that applies to all other non-Firm Facilitated orders (i.e., orders that do not yield fee code FF).

The current Floor Broker Sliding Scale Rebate Program tiers and corresponding rebates are as follows:

- Tier 1 provides a rebate of \$0.01 per contract for all qualifying (i.e., Non-Customer, Non-Strategy, Floor Broker orders in all products except Underlying Symbol List A, Sector Indexes, DJX, MRUT, MXEA, MXEF, NANOS, XSP, and FLEX Micros) Firm Facilitated orders, and a rebate of \$0.03 per contract for all qualifying non-Firm Facilitated orders, where a TPH has a Step-Up Volume in Non-Customer, Non-Strategy, Floor Broker Volume (in applicable products) from April 2021 that is greater than zero contracts;
- Tier 2 provides a rebate of \$0.01 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.04 per contract for all qualifying non-Firm Facilitated orders, where a TPH has a Step-Up Volume in Non-Customer, Non-Strategy, Floor Broker Volume (in applicable products) from April 2021 that is greater than or equal to 100,000 contracts;
- Tier 3 provides a rebate of \$0.01 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.05 per contract for all qualifying non-Firm Facilitated orders, where a TPH has a Step-Up Volume in Non-Customer, Non-Strategy,

⁷ Orders that yield fee code FF are not assessed a charge. See Cboe U.S. Options Fee Schedules, Fees and Associated Fee Codes, available at: https://markets.cboe.com/us/options/membership/fee_schedule/cboe/.

Floor Broker Volume (in applicable products) from April 2021 that is greater than or equal to 250,000 contracts; and

- Tier 4 provides a rebate of \$0.015 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.06 per contract for all qualifying non-Firm Facilitated orders, where a TPH has a Step-Up Volume in Non-Customer, Non-Strategy, Floor Broker Volume (in applicable products) from April 2021 that is greater than or equal to 500,000 contracts.

The Exchange now proposes to update the Floor Broker Sliding Scale Rebate Program. Specifically, the Exchange proposes to amend tier rebates for Tiers 1, 3, and 4, and to amend tier criteria for all Tiers 1 through 4. The proposed changes are as follows.

- Tier 1, as amended, provides a rebate of \$0.005 per contract for all qualifying (i.e., Non-Customer, Non-Strategy, Floor Broker orders in all products except Underlying Symbol List A, Sector Indexes, DJX, MRUT, MXEA, MXEF, NANOS, XSP, and FLEX Micros) Firm Facilitated orders, and a rebate of \$0.020 per contract for all qualifying non-Firm Facilitated orders, where a TPH has Volume in Non-Customer, Non-Strategy, Floor Broker (in applicable products) that is greater than zero contracts;
- Tier 2, as amended, provides a rebate of \$0.01 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.04 per contract for all qualifying non-Firm Facilitated orders, where a TPH has Volume in Non-Customer, Non-Strategy, Floor Broker (in applicable products) that is greater than or equal to 250,000 contracts;

- Tier 3, as amended, provides a rebate of \$0.02 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.07 per contract for all qualifying non-Firm Facilitated orders, where a TPH has Volume in Non-Customer, Non-Strategy, Floor Broker (in applicable products) that is greater than or equal to 500,000 contracts; and
- Tier 4, as amended, provides a rebate of \$0.025 per contract for all qualifying Firm Facilitated orders, and a rebate of \$0.1 per contract for all qualifying non-Firm Facilitated orders, where a TPH has Volume in Non-Customer, Non-Strategy, Floor Broker (in applicable products) that is greater than or equal to 1,000,000 contracts.⁸

Additionally, the Exchange proposes certain clean-up changes to its Fees Schedule to eliminate PULSe Workstation fees and references in the Routing, Network Access Port, and Logical Connectivity sections and Footnotes 27 and 45, as PULSe was decommissioned in January 2021, and thus, such fees and references are obsolete. The Exchange also proposes to eliminate reference to Cboe “Command” system in Footnotes 27, 36, and 45 of the Fees Schedule, as it no longer uses that naming convention with respect to its system.

⁸ The proposed change also amends language in the Fees Schedule regarding the Floor Broker Sliding Scale Rebate Program to note that the Exchange will aggregate a TPH's volume with the volume of its affiliates (“affiliate” defined as having at least 75% common ownership between the two entities as reflected on each entity’s Form BD, Schedule A) for the purposes of calculating Volume each month (rather than Step-Up Volume).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁹

Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹² which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

As stated above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed changes

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ Id.

¹² 15 U.S.C. 78f(b)(4).

reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange's trading floor, which the Exchange believes would enhance market quality to the benefit of all TPHs. The Exchange notes that the proposed volume-based incentives and discounts, as amended, are reasonable, equitable and non-discriminatory because they are open to all TPHs on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including incentive programs that offer rebates or rates that apply based upon TPHs achieving certain volume thresholds.

The Exchange believes that reducing the rebates offered under Tier 1 is reasonable because TPHs are still eligible to receive a rebate for meeting the corresponding criteria, albeit at a lower amount than before. The Exchange believes that increasing the rebates offered under Tiers 3 and 4 is reasonable because TPHs will be receiving higher rebates for meeting the corresponding criteria. The Exchange believes the proposed changes to the rebate amounts offered under these tiers are commensurate with the corresponding criteria under the respective tiers, even as amended.

The Exchange also believes that the proposed changes to the Floor Broker Sliding Scale Rebate Program are reasonable and equitable because they are designed to incentivize increased order flow in multiply-listed options to the Exchange's trading floor. The

Exchange believes the changes are reasonably designed to encourage market participants to submit Non-Customer, Non-Strategy order flow, which provides liquidity to the Exchange's trading floor, facilitates tighter spreads and may attract an additional corresponding increase in order flow from other market participants. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, as well as improved price opportunities for all market participants.

Moreover, the Exchange believes that the proposed changes to the criteria and rebates of the Floor Broker Sliding Scale Rebate Program are reasonable as they are comparable to the tier criteria and rebates or reduced rates offered under similar volume-based incentive programs offered at other options exchanges.¹³ The Exchange also believes that it is reasonable to continue to offer higher rebates for Non-Firm Facilitated order flow than for Firm Facilitated order flow (i.e., where the same executing broker and clearing firm are on both sides of the transaction) because it wishes to further incentivize order flow that attracts contra-side interest from a wider variety of market participants, which may further contribute towards a robust, well-balance market ecosystem.

¹³ See BOX Options Fee Schedule, Section V(C), Qualified Open Outcry ("QOO") Order Rebate, which offers a rebate for floor broker orders of \$0.075 or \$0.05 per contract (depending on the capacity) and does not apply to Strategy QOO Orders. See also NYSE American Options Fee Schedule, E.1, Floor Broker Fixed Cost Prepayment Incentive Program (the "FB Prepay Program"), which offers participating floor brokers annual rebates for achieving growth in manual volume by a certain percentage as measured against certain benchmarks, and does not apply to volume executed as part of Strategy Execution Fee Cap (that is, strategy orders); and NYSE Arca Options Fee Schedule, Floor Broker Fixed Cost Prepayment Incentive Program (the "FB Prepay Program), which provides a rebate for floor broker orders on manual billable volume of \$0.08 to \$0.10 per billable side (based on billable sides), and excludes strategy executions from the program.

The Exchange believes that the proposed changes to the Floor Broker Sliding Scale Rebate Program represent an equitable allocation of fees and are not unfairly discriminatory because the program, as amended, applies uniformly to all qualifying TPHs, in that all TPHs that submit the requisite order flow (i.e., Non-Customer, Non-Strategy, Floor Broker Volume in multiply-listed options) have the opportunity to compete for and achieve the tiers, as amended. The proposed rebates will apply automatically and uniformly to all TPHs that achieve the proposed corresponding criteria. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether these proposed changes would definitely result in any TPHs qualifying for Tiers 1 – 4. While the Exchange has no way of predicting with certainty how the proposed changes will impact TPH activity, based on trading activity from the prior months, the Exchange anticipates that at least 2 TPHs will achieve Tier 2, 2 TPH will achieve Tier 3 and 1 TPH will achieve Tier 4.

Finally, the Exchange believes eliminating PULSe fees and references as discussed above is reasonable as such PULSe has been decommissioned, rendering such fees and references obsolete. The proposed change to eliminate references to Cboe “Command” is also reasonable as the Exchange no longer refers to its system as “Cboe Command”. The proposed deletions reduce potential confusion and maintain clarity in the Fees Schedule.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the Exchange believes that the proposed changes encourage the submission of additional liquidity to the floor of a public exchange,

thereby promoting market depth, price discovery and transparency and enhancing order execution and price improvement opportunities for all TPHs.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the Floor Broker Sliding Scale Rebate Program, as amended, will apply equally to all similarly situated TPHs that submit the requisite order flow. That is, the proposed criteria and rebates will apply equally to all Non-Customer, Non-Strategy, Floor Broker orders in multiply-listed options. The Exchange does not believe that the continued application of Floor Broker Sliding Scale Rebate Program to Non-Customer orders will impose any significant burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the Exchange recognizes that Non-Customer participation in the markets is essential to a robust hybrid market ecosystem as each contributes unique and important liquidity to the Exchange's trading floor, as described above. Such Non-Customer order flow may result in overall tighter spreads, attracting order flow from other market participants, more execution opportunities at improved prices, and/or deeper levels of liquidity, which may ultimately improve price transparency, provide continuous trading opportunities and enhance market quality on the Exchange, to the benefit of all market participants.

The Exchange also does not believe that the proposed changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the Act because, as noted above, competing options exchanges have similar incentive programs and discount opportunities in place in connection with floor broker order

flow.¹⁴ Additionally, and as previously discussed, the Exchange operates in a highly competitive market. TPHs have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges, many of which offer substantially similar volume-based incentive programs.¹⁵ Based on publicly available information, no single options exchange has more than 15% of the market share.¹⁶ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange, and, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁷ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a

¹⁴ See supra note 13.

¹⁵ See supra note 13.

¹⁶ See supra note 3.

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁸ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and paragraph (f) of Rule 19b-4²⁰ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

¹⁸ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form

(<https://www.sec.gov/rules/sro.shtml>); or

- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2023-030 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CBOE-2023-030. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street

NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2023-030 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Sherry R. Haywood,
Assistant Secretary.

²¹ 17 CFR 200.30-3(a)(12).